Date: June 3, 1994

In the matter of	
TERRY DYSERT,	
Complainant	
v.	Case No. 93-ERA-21
FLORIDA POWER CORPORATION,	
Respondent.	

APPEARANCES:

Stephen Kohn, Esq.
David Colapinto, Esq.
For Complainant

Lewis Sapp, Esq.
Ronald E. Gaddy, Esq.
Gerald A. Williams, Esq.
For Respondent

BEFORE: EDITH BARNETT
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

I. INTRODUCTION

This proceeding arises under the employee protection provisions of the Energy Reorganization Act of 1974, as amended, 42 U.S.C. §5851 (the ERA). The issues for resolution are:

1. Is complainant a covered employee under the ERA?

2. Do the 1992 ERA amendments apply retroactively to render timely complainant's otherwise untimely

complaint?

3. Has complainant established a violation of the ERA?

The complainant is Terry Dysert, a nuclear engineer. He was born on February 26, 1949. He has a B.S. degree in general engineering from the University of Illinois in 1972, a Master's degree in industrial management from Xavier University in Cincinnati, Ohio, in 1975, and 50 or 60 hours towards a Master of Science Degree in nuclear engineering from the University of Cincinnati. Prior to his employment with FPC, he had worked in the field of nuclear engineering for 15 years. (T. 22, 124; RX-14 pp. 9-10; RX 20).[1]

The respondent in this case is Florida Power Corporation (FPC). FPC operates a nuclear power plant in Crystal River, Florida, Crystal River Unit 3 (CR-3), where complainant was employed through Energy Services Group of Williamsburg, Virginia (ESG) on a one-year contract beginning January 6, 1992. He was terminated approximately six months later on July 3, 1992. He contends that his termination constitutes unlawful retaliation for protected whistleblower activities.

FPC argues that Dysert's complaint is untimely, that his activities at issue were not protected, and that his discharge was not retaliatory, but was part of a general layoff of supplemental temporary personnel in response to budgetary overruns associated with an outage at the plant. An outage is a planned shutdown of a nuclear power plant, usually for seven to eight weeks, for refueling and maintenance. CR-3 started an outage ("Refuel 8") on April 30, 1992, which began winding down in mid-June, 1992. (T. 161-63, 208-209, 393-5; RX-15, pp. 2, 4, 6, 8; RX-23).

Dysert filed his ERA complaint against FPC on December 11, 1992, asserting that his termination was retaliation for making internal complaints to FPC management about procurement of safety related equipment and for his activities as a whistleblower against other companies. Dysert's complaint was received by the Department of Labor (DOL) on December 14, 1992. On January 22, 1993, the Assistant District Director of the Tampa District Office of DOL's Wage and Hour Division notified complainant that its fact finding investigation had not substantiated his allegations because:

Your termination was found to be a decision by Florida

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Power Corporation to extend the services of Mr. Varner [another contract engineer] an additional six months, and to terminate your contract six months early.

Dysert timely appealed these findings and requested a hearing.

After due notice, I held a hearing in this matter at Wilmington, Delaware, on February 18-19, 1993. All parties were represented by counsel and had a full opportunity to offer oral

testimony and documentary evidence. On May 10, 1993, after the hearing, complainant took a telephone deposition of Oscar De Miranda, senior allegations coordinator at Region II of the Nuclear Regulatory Commission (NRC). It is received in evidence as Complainant's Exhibit 27. The parties' post hearing briefs and proposed findings of fact and conclusions of law have also been considered. The record consists of the transcript of the proceedings ("T."); Administrative Law Judge's Exhibit ("ALJX") 1; Respondent's Exhibits ("RX") 3-10, 12-18, 20, 22-23, 25, 27, 29; and Complainant's Exhibits ("CX") 1-7, 12-17, 19-24, 27. CX-25 for identification was rejected and has not been considered, but is included in the record as complainant's offer of proof. (See T. 421).

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Factual Background

1. *Complainant's Hire by FPC*

FPC uses ESG and several other employment agencies to supply supplemental personnel in a number of job classifications, including senior nuclear engineer, to accommodate substantial fluctuations in its staff needs due to outages. (See RX-14, pp. 12-15; RX-15, pp. 4,6, 33-36; T. 334). FPC executed the contract with ESG which led to Dysert's employment on February 6, 1991, and added several written amendments thereafter. The contract provided for ESG to supply FPC with 19 job classifications of supplemental personnel, including 9 separate nuclear engineer classifications. Personnel provided to FPC were stated to be ESG's employees. FPC reserved the right to set their hours of work, to terminate them during their first five days for unacceptable performance without pay, and thereafter to terminate them with pay at any time for cause or due to early completion of the work. (RX-25 pp. 3, 6, 8, 12-16, 18, 131-132 (pars. III, VIII), 146-150, 153).

On October 30, 1991, FPC sent ESG, as well as its other employment agencies, a "request for resumes for staff augmenta

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tion" for a senior Nuclear Engineer position in the electrical/Instrument & Controls (I&C) section of the Nuclear Procurement Engineering Services department (NPES) of CR-3. In addition to the electrical/I&C section, NPES also has a mechanical/structural section. NPES is part of the Site Nuclear Engineering Services Organization (SNES) of the Nuclear Operations Engineering and Projects Division of CR-3. Resumes for the position were to be submitted to D.E. Porter, FPC's contract manager, and to Jim Colby, the manager of NPES. (RX-14, pp. 11, 18; ALJX-1, pp. 1,2,4; T. 204-6, 328-30, 333).

On November 14, 1991, ESG submitted Dysert's resume to FPC. (RX-14, pp. 8A[2] , 9, 10). On December 9, 1991, FPC sent ESG a request to hire him, and, on December 10, 1991, ESG responded with a proposal for providing his services. (RX-14, pp. 3,4,6-8). On December 30, 1991, FPC prepared a work authorization for

Dysert. It states that he was hired as "staff augmentation" in "an approved peak position." (RX-14, pp. 1-2; T. 334-5). Dysert then signed a contract with ESG. (CX-1; T. 25-28).

The contract between Dysert and ESG provided that it was "the sole and entire agreement between [Dysert] and ESG in connection with [his employment at FPC] and supersede[d] all prior and contemporaneous understandings or agreements, written or oral." (CX-1, par. 12). The term of Dysert's employment could be extended and the agreement modified only by written agreement with ESG. (CX-1, pars. 5,7). ESG could terminate his employment for cause at any time, and either he or ESG could elect to terminate his employment with or without cause on thirty days written notice. (CX-1, par. 5; T. 25-26). These provisions did not apply to FPC, which, as discussed above, could terminate Dysert without regard to ESG's actions.

During his employment at FPC, Dysert recorded his hours worked on ESG time sheets. He submitted them for approval to John Sipos, who signed them on behalf of Jim Colby. ESG then submitted bills for Dysert's services to FPC's contract administrator. (RX-14, pp. 24-53).

John Sipos was Dysert's immediate supervisor. He has been employed by FPC since 1983, and has served as a senior nuclear procurement engineer at CR-3 since August, 1990 and as lead engineer for electrical/I&C since June, 1991. He reported to Jim Colby, who reported to Hugh Gelston, the acting manager of SNES. Colby had been with FPC for 23 years. His predecessor as manager of SNES was Earl Welch, whose signature appears on some of the exhibits. (T. 202-6, 328; ALJX-1 pp. 2,4).

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At the time Dysert began work at FPC in January, 1992, in addition to lead engineer John Sipos, the electrical/I&C section of NPES had three permanent FPC senior nuclear procurement engineers, Barry Chastain, Gary Reynolds and Butch Bernaby, and another contract engineer, Steve Taylor. The next month, February 1992, Tom Varner was also hired through ESG into the Electrical/I & C section as a senior nuclear procurement engineer, but for a six-month contract only, to expire on July 31, 1992. Varner's hiring procedures and arrangements with FPC were the same as Dysert's. (Compare RX-14 and RX-15). In that same month, Howard Leon was hired from a contractor other than ESG for a six-month contract as a senior procurement engineer in the mechanical/structural section of NPES, which also had three permanent senior engineers. (T. 208, 209, 343, 353).

Although Dysert testified that "there were positive indications" that he might "roll over" to another contract or to a permanent position as had been done for others in the past (T. 24), he did not elaborate in testimony or provide any additional details as to who offered these indications. The contract he signed with ESG does not include any promise of continuing employment. Jim Colby of FPC testified that he had not discussed

any such possibilities with Dysert, either at the time of hire or later. (T. 348). He testified that, on the contrary, FPC often gives early releases to contract employees such as contract engineers. (T. 397).

2. *Complainant's Duties at CR-3*

Complainant's duties as an engineer in NPES are set forth in RX-12, which lists the 22 primary functions or tasks of nuclear procurement engineers at CR-3. They include, *inter alia*, resolving supplier deviation requests, developing plant equipment equivalency replacement evaluations ("PEERES"), and evaluating and resolving technical problems discovered during the inspection of items purchased. The types of engineering documents Dysert was expected to complete on a regular basis are set forth at CX-23. (See T. 371-3).

The primary function of NPES is to review and process all purchase requisitions for plant equipment, in order to determine whether to purchase the item as safety or non-safety related[3] and to develop a procurement package, including bid requirements, for prospective vendors. Purchase requisitions are generated in one of two ways, either manually by FPC personnel, or automatically by FPC's inventory system, whenever inventory for a particular item declines to a certain point. Usually, NPES handles 500 to

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600 purchase requisitions per month. That number increases to more than 1,000 a month before and during outages. If a prospective vendor's proposal in response to the procurement package requests a change in any of the bid requirements, the request, known as a supplier deviation request ("SDR") is also referred to NPES for evaluation and a recommended disposition. NPES processes an average of 20 to 30 SDRs per month. (T. 209, 219, 287, 336-8).

NPES works together on procurement with Quality Programs, also called Quality Assurance (QA). QA is, like Nuclear Operations and Engineering of which NPES is a part, one of the eight functional divisions of CR-3's nuclear operations. (ALJX 1, pp. 1, 13). NPES determines the technical and documentary requirements and generates the necessary paper work for any item to be purchased. QA inspects the vendor's facility and processes (a "source inspection") to ensure that the item is manufactured in accordance with FPC's requirements, and inspects the item upon delivery (a "receipt inspection") to ensure that it is the part ordered, and that it generally meets all technical and documentary requirements. (T. 220-221).

NPES manager Jim Colby routes all purchase requisitions that come into NPES to either the mechanical/structural or electrical/I&C section. In the case of mechanical/structural items, Colby himself assigns the purchase requisitions to specific procurement engineers and supervises and signs off on the procurement documents generated; in the case of electrical/I&C items, he routes the requisitions to lead engineer John Sipos, who in turn

assigns the work to other engineers in that section, supervises their work, and reviews and signs off on any procurement documents generated. (T. 204-6, 210, 329-30, 333, 363; see also CX-5, RX-4,6).

3. *The JCC relays*

In February, 1992, the plant's automatic inventory system generated a system maintenance requisition for certain relays manufactured by the Joslyn Clark Controls Company (JCC), a long time supplier for CR-3. Relays are electro-mechanical instruments which function as isolation devices between safety-related and non-safety related systems. (T. 40, 218; See CX 20, 21). Purchase order (P.O.) F740562D for three of the relays was issued to JCC on March 18, 1992. (T. 85, 224; RX 10). The requisition for the relays was referred to NPES for technical evaluation and to the Quality Assurance (QA) division (also known as Quality Programs) for development of an inspection plan.

The type of inspection required for any item procured depends upon whether the item is secured from a so-called Appendix B or non-Appendix B supplier. An Appendix B supplier meets the requirements of the Code of Federal Regulations in the manufacture of the item and provides full documentation to FPC upon delivery that the item can be used in a safety-related application; a non-Appendix B supplier provides "commercial grade" equipment which FPC itself must qualify as usable for safety-related applications after delivery. Because JCC was a non-Appendix B supplier, and the relays were a commercial grade item, FPC itself had to qualify them as usable for safety related applications. (T. 102, 212-13, 220, 225, 336-7).

The QA representative assigned to the procurement of the JCC relays was Ron Smith, a senior nuclear quality assurance specialist. He arranged for the source inspection of JCC to be conducted by EBASCO, a third party company that provides engineering and inspection services for companies such as FPC. The EBASCO inspector, Bob Allison, determined that JCC had made changes to the relays since FPC had initially purchased and qualified them for use at CR-3 in 1971. He was therefore unsure whether the company could provide the necessary certification that the replacement relays it was to furnish were essentially unchanged from the originals. Such certification is required by paragraph 3 of Letter 1197, the parts specification form letter which was part of the procurement package for the relays. (T. 57-61, 221, 318-320; ALJX-1, p. 13; RX-3, pp. 3,8).

Allison's concerns led to considerable correspondence among JCC, EBASCO, and FPC, and within FPC. On March 24, 1992, Ron Smith sent a "hot" memo to Earl Welch, Colby's predecessor at NPES, advising him of Allison's concerns that, because of the changes, JCC would be unable to meet FPC's technical requirements for the relays. Smith proposed amending Letter 1197 to tighten the "no change" requirements substantially. This amended letter

was designated as 1197A. Colby forwarded the memo to Sipos, who assigned it to complainant. (T. 224-225; RX-3, p. 2; CX 3).

As part of his routine duties in connection with all procurement, Dysert prepared a safety related procurement requisition checklist form and a Functional Analysis/Critical Characteristic Review Form, with attachment, for the relays. On March 24, 1992, after these documents were signed off by Gary Reynolds, the verification engineer, and Sipos, they were sent with letters 1197 and 1197a to JCC. (T. 227-230). In response, on April 21, 1992, JCC's quality control manager, Richard Schneider, submitted a supplier deviation request (SDR) to Ron Smith requesting

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changes in the purchase order specifications as follows: (1) as to the source inspection, reversion to the "no-change" requirements of Letter 1197; and (2) as to the receipt inspection, amendment of standard inspection plan type AAZ to eliminate references to certain tests. (RX-5, pp. 1-2).

On May 21, 1992, Schneider at JCC wrote to Ron Smith to remind him about the SDR and to request an expedited response. He said that the relays had been sitting in his office for a month, and that he would like to have the EBASCO inspector schedule a return trip so that they could be shipped. He stated that the SDR was merely a request to revert to the certification requirements "under which product was built, inspected & shipped for years." (RX 5, p. 3). Dysert was assigned the SDR for the JCC relays on the same day. He designated the two changes requested by JCC as problems (1) and (2). (CX-24; RX-5, pp. 1-2; T. 70, 231-232, 406).

4. *Complainant's work on the JCC SDR.*

Dysert prepared a number of draft dispositions of JCC's SDR before the fourth was finalized and issued on June 15, 1992. He testified that he had never previously been asked by FPC to change a rejection of an SDR to an acceptance. According to Sipos, however, reviewer rejections of proposed SDR dispositions do occur. (T. 288).

In his first draft, dated May 22, 1992, Dysert recommended accepting the changes requested by JCC, even though the company wanted to make the "no-change" certification only back to 1982, instead of 1971 as previously required. On May 28, 1992, Jim Colby rejected the 1982 date and reinstated the 1971 date. (CX 24; T. 408-10).

On May 29, 1992, EBASCO inspector Allison faxed a memo to Ron Smith at FPC providing a two-page printout by JCC entitled "indented bill of material" ("the JCC bill") setting forth a detailed list of all the engineering changes made to the JCC relays since 1963. Dysert testified that the printout contained so many changes that it raised safety concerns. A modified JCC relay "may look the same," but "may not perform the same in a safety related activity and fail to perform its safety related function." (CX-4; RX-5, pp. 5-7; T. 60-61, 63, 232, 279, 299-300,

408).

On that same day, Dysert prepared a second disposition of the JCC SDR recommending rejection. He proposed to ship the

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relays to a third company, Farwell & Hendricks (F&H), for testing to determine if the engineering changes were significant in terms of seismic qualifications (equipment response to earthquakes) and if the relays otherwise met QA standards. (T. 69, 71, 237, 411-12; CX-5). Complainant then issued this disposition of the SDR to JCC, after it was endorsed by Sipos and initialed by an unidentified procurement quality assurance representative other than Ron Smith. (CX-5; T. 81-2, 151).

Ron Smith in FPC QA then sent a fax to Schneider at JCC, effectively revoking the May 29 SDR disposition by describing it as "a preliminary copy." He apologized for the delays, and included source inspection forms for use by EBASCO inspector Allison, who made the inspection the same day. Allison noted, however, that, although the relays were acceptable, they could not be released for shipment to CR-3 until the JCC SDR had been resolved. (RX-7).

Dysert prepared a third draft disposition of the JCC SDR on June 4, 1992. He again proposed rejecting the SDR. He also now recommended cancelling the purchase order for the relays entirely and issuing new bid requests, but only to vendors with acceptable QA programs such as Farwell & Hendricks. (CX-7; T. 85).

JCC quality control manager Richard Schneider wrote to Ron Smith again on June 8, 1992, complaining that he was having difficulty explaining why they were having "all this trouble" in getting a revised Source Inspection Plan, and that he would appreciate the earliest response possible permitting release of the relays for shipment. He reminded Smith that shipment had been ready for 6 weeks and that EBASCO inspector Bob Allison had visited twice, but the relays were still in his office. (RX 8).

Complainant prepared the fourth and final draft disposition of the JCC SDR on June 11, 1992. (RX-6; T. 290). He made the following recommendations. As JCC had requested, the "no-change" requirements of Letter 1197 were to be substituted for those of Letter 1197a with respect to the source inspection plan. The relays were to be accepted for shipment, but, on receipt, Quality Control Receiving was to put them on "quality control hold." This meant that they would be specially tagged, held separately in the Quality Control holding cage, and unavailable for use in safety-related applications until FPC had the opportunity to evaluate and test them. (T. 236-7, 238, 239, 241, 252, 261-5, 314-315, 317-318, 324-325; RX-9). Dysert signed this disposition on June 11, 1992, Sipos signed it on June 12, 1992, and Ron Smith initialed it with minor changes on June 15, 1992.

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The evidence on how this fourth and final disposition of the JCC SDR was reached was sharply conflicting. Complainant testified that he was unusually closely supervised on the SDR, that his "judgment was altered by [Colby's] pressures" to change his proposed disposition from rejection to acceptance, and that the June 11 SDR disposition "violate[d] [his] judgment." He testified that he wrote it "as a result of the pressure put on me by Mr. Colby and Mr. Sipos ...." (T. 157). The testimony of Colby and Sipos was to the contrary.

Dysert testified that he gave the proposed June 4, 1992 disposition to Sipos, who rejected it and asked him to change the purchase order designation from "D" to "X", "a lesser way of procuring [which] didn't have all the requirements." Complainant testified that, after he expressed his disagreement to Sipos, he then received a visit from Colby, who told him he wanted the disposition changed, instructed him not to include any recommendations for third party testing, and wrote out the language he wanted included in the disposition section. (T. 86-7, 89-93, 234-5, 237-8, 302, 318). Complainant testified that Colby "pretty much outlined exactly what was to go in there." (T. 92-3).

Sipos denied having seen the June 4 proposed SDR disposition prior to the administrative hearing. He denied going to Colby to discuss Dysert's handling of the relays issue prior to receiving the fourth draft of the disposition, RX 6. He denied directing Dysert to change the language or coding in the disposition section of the SDR. (T. 234; CX-6, 7). He denied asking complainant to change the purchase order designation. (In fact, the purchase order designation on the final disposition remained a "D".) Sipos explained that, because the relays were for inventory rather than for immediate use, they were not a pressing problem. (T. 234-237, 288).

Colby testified that he was aware of the JCC relays issue but did not consult directly with complainant about the issue. (T. 338-339). He denied dictating to Dysert what to say in the disposition section of the SDR form, or putting pressure on him in any way. (T. 338-340, 349). He denied any knowledge that Dysert wanted to send the relays to F&H for testing. (T. 380).

Dysert testified that he showed Sipos the list of changes on the JCC bill and that Sipos suggested that there might be another way to take care of the problem besides the testing by F&H, including finding an equivalent item or finding the changes on the list insignificant. Complainant testified that he objected

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to stating that the changes were insignificant, that Sipos seemed angry that he would not follow his orders and walked away. (T. 63-5). Sipos denied telling complainant to treat the changes on the JCC bill as insignificant or that he had even discussed the JCC bill with anyone at the plant. He testified that he did not believe the issue was insignificant. (T. 279-80, 282-83, 299). Sipos did, in fact, sign off on complainant's May 29, 1992 disposition recommending sending the JCC relays to F&H for testing. He testified that, at the time, he agreed with the

recommendation. (T. 288).

Dysert also testified that, if the relays could not be qualified, FPC might have had to change its technical specifications ("tech specs"), which require approval by NRC, before it could install JCC replacement relays anywhere in the plant. He testified that, at some point, he had tried to survey all the locations in the plant where the JCC relays were installed to determine whether they were safety-related or not. He claimed that Sipos told him he was going beyond his scope as a procurement engineer. Sipos denied having a discussion with Dysert about such a survey, or instructing him not to conduct it. (T. 77-8, 275-6).

Sipos testified that the final disposition of the JCC SDR was Dysert's decision, worked out by complainant in cooperation with Ron Smith. After issuance of the May 29, 1992 disposition, they had determined that a better and more cost effective course of action than sending the relays to F&H for testing would be to accept them for shipment, put them on "quality control" hold on receipt, and evaluate all the JCC relays in the plant later. (T. 236-239).

Dysert testified that there was nothing illegal about this final disposition of the SDR and that he would not have signed it otherwise. He also testified that the disposition did not violate NRC regulations. He did not complain about the safety of the final disposition through any of FPC's suggested avenues for raising safety issues. He did not prepare a problem report for higher FPC management, did not file an internal anonymous and/or confidential complaint under FPC's nuclear safety concerns program, did not file a complaint with the NRC or any other agency, and did not initiate personal contact with the NRC resident agent at CR-3. When he left FPC less than a month later, he did not mention the situation on the form provided to report illegal or unsafe conduct related to plant maintenance and operation. (T. 145-7, 149, 166-167, 170-171, 176; RX-29; CX-27 pp. 7-8; RX-13, p. 9-11; RX-27).

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5. *Complainant's termination*

In mid-June, 1992, CR-3 was completing work on the outage that had begun on April 30, 1992. FPC's regular work force had been supplemented by contractors in preparation for and during the outage. (T. 164-5; RX-23). Senior Vice President for Nuclear Operations Pat Beard called a meeting with plant managers and supervisors at which he advised that the outage was over budget, in part because of problems with the plant's turbine, and that costs had to be reduced. (T. 341-342, 394-395).

One of the FPC departmental goals established for SNES for 1992 was to reduce costs by, *inter alia*, "minimizing the use of and releasing peak SNES supplemental manpower ahead of current schedule." SNES acting manager Hugh Gelston was respon-

sible for monitoring the supplemental manpower levels in SNES. SNES' level of supplemental manpower was prominently featured in every SNES monthly report for 1992, as well as the SNES second quarter goals report. (RX-21, p. 4; RX-22; RX 23; T. 385-393).

Following the meeting with Beard, Gelston directed all the managers who reported to him to release their supplemental employees as soon as possible. He told Colby to release his two outage support personnel, Howard Leon and Tom Varner, one month early. They had been scheduled to leave on July 31, 1992. Colby obtained Gelston's agreement to keep Leon to complete a project in progress. He then directed Sipos to release Varner one month early. Sipos said to Colby that "if we had to let one body go, [h]e would rather keep Tom Varner and let [Complainant] go. ... [because] Mr. Varner was a better performer. ..." (T. 266, 268, 342-44, 395-397).

Sipos testified that he preferred Varner to Dysert because he felt that Varner was "more of a detail person ... , was just more detailed about his work, seemed to know more about it." Varner also impressed Sipos with his ability to work independently: "you'd give him something, it'd be done and it would be done correctly." Sipos characterized Varner as a better communicator than complainant, whom he felt was sometimes difficult to understand and hard to get a response from. Complainant was not a performance or disciplinary problem; he did "adequate work" and "what was required of him." Given the choice, however, Sipos wanted to keep the better performer. (T. 268-269).

Sipos testified that he would have made the same recommendation to Colby even if complainant had not been assigned to the

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JCC relays problem and that it played no part in his recommendation to Colby. (T. 269-271). Colby testified that he acceded to Sipos' request to substitute Dysert for Varner, because, based on Sipos' ability to directly observe the performance of the procurement engineers in electrical/I&C on a day-to-day basis, he "had no reason to question [Sipos'] judgment." (T. 344-345).

Colby and Sipos met with complainant on the following day, June 19, 1992. Colby told complainant that his services were being terminated for budgetary reasons, that he was giving complainant two weeks' notice, and that his last day of work would be July 3, 1992. He also told Dysert that the decision to terminate him had nothing to do with his work productivity or quality of work. Prior to this meeting, no one had criticized complainant's production, counseled him in a disciplinary fashion to change his work behavior, given him a bad evaluation, reprimanded or suspended him, or threatened him with termination. (T. 94-96, 105, 272-273, 286-7, 322, 345, 360-62).

On June 22, 1992, the FPC contract administrator informed ESG that the company was concluding Dysert's assignment effective 7/3/92 and intended to continue Varner's term of assignment through December 31, 1992. (RX-14, p. 19). Colby provided complainant with the names of several CR-3 supervisors who might

have a vacancy in a temporary position, as well as a letter of recommendation at complainant's request. The letter of recommendation, dated July 1, 1992, stated that complainant's quality and quantity of work output was at an acceptable level and the company would consider rehiring him for future contractor positions. (T. 102-105, 346-347, 361-62; RX-18; CX-13).

On July 1, 1992, Colby filled out an internal evaluation form on Dysert. He checked the "yes" box in response to the question of whether he would consider using Dysert again. Under "comments," he stated that Dysert was "a little slow, but quality and quantity of work output was acceptable." (RX-17). The complainant attempted to refute the assessment that he was "slow" by offering evidence that, during the one month period from April 21 to May 20, 1992, he completed more engineering documents than Varner. (T. 366; CX 23). Complainant offered no evidence, however, as to his performance during the other five months of his employment, and it is therefore unclear whether his production in that month was representative. Finally, his quantity of production is irrelevant because it is undisputed that Colby, the management official responsible for Dysert's termination, did not rely on it in terminating him.

Dysert's last day of work was July 3, 1992. He acknowledged

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that, when the CR-3 outage was completed, other employment contracts expired and other people were laid off. (T. 94, 165; RX-23). The total number of people in SNES declined significantly between June and July, 1992. (RX-23; T. 394). On July 14, 1992, SNES acting manager Hugh Gelston reported that the departmental goal of releasing supplemental manpower ahead of schedule "has been successfully met." SNES had been authorized 42 supplemental positions for the outage: two positions were not filled; twenty-five positions were released early; and the remaining positions were being released according to schedule. (T. 389, RX-21, p. 4).

Leon was terminated on July 31, 1992. (T. 348). Varner's contract was extended from July 31 to December 31, 1992 to fill the unexpired term of Dysert's position. Although Colby initially sought to extend Varner's contract for the following year (RX-15, p. 32; T. 354), higher management questioned his continuing need for five procurement engineers, including Varner. (RX-15, pp. 33,36). Colby then obtained another engineer when an FPC permanent employee transferred from another position within SNES, and instructed contract manager Porter to cancel Varner's work authorization for 1993. (RX-15, pp. 28-29). Varner's last day of work was December 20, 1992. (T. 348, 354, 357; RX-14, p. 19; RX-15, pp. 18, 22, 28-33, 97-99).

6. *Complainant's contacts with Thomas Saporito*

The only other live witness presented by Dysert at the hearing was Thomas Saporito, Jr., a former CR-3 employee and founder of an organization called the Nuclear Energy Accountability Project. (T. 178). He testified that he had experience

communicating with nuclear industry employees as confidential "allegers" and had acted as a conduit to pass information related to their safety allegations to the NRC. (T. 182-3). He testified that, on June 30, 1992, Dysert had made a complaint to him about the JCC relays in a telephone conversation, that he had prepared a contemporaneous memo to the file documenting the conversation (CX-22), and that he had subsequently brought Dysert's complaint to Oscar DeMiranda, senior allegations coordinator for the NRC in Region II headquarters in Atlanta, Georgia. (T. 177, 180, 188-190).

Saporito's testimony was apparently intended to support a claim that, even if the 1992 amendments to the ERA did not apply to make Dysert's DOL complaint timely, his contact with Saporito constituted a timely administrative filing. Dysert initially characterized his communication with Saporito as a complaint with the NRC through Saporito as his agent. (T. 149). After acknowl

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edging on cross examination that Saporito was a private citizen, not his attorney, and not employed by FPC, NRC or DOL, Dysert conceded that the only whistleblower complaint he had filed against FPC under the ERA was the complaint filed with DOL in December 1992. (T. 128-131; 148-9).

Because of my disposition of the timeliness issue as discussed below, I do not need to reach the issue of whether complainant's contact with Saporito constituted a timely administrative filing. I find, however, that Saporito's testimony was not credible.

Saporito described Dysert as being "anxious" about his position and concerned that his job was "in jeopardy", in both his testimony and his supposedly contemporaneous memo to the file about their June 30, 1992 telephone call. (T. 180-182, 192). By this date, however, Dysert no longer had any reason for uncertainty, because he had already been notified of his termination 11 days previously, on June 19, 1992. Additionally, Saporito stated in the memorandum, CX-22, that Dysert "*later*" mailed him a copy of a fax (CX-19] he found at CR-3. Since Dysert found the fax on the same day Saporito supposedly prepared the June 30, 1992 memorandum, "later" can only mean after June 30, 1992. Because of these discrepancies, I do not find credible Saporito's assertion that this memorandum was written contemporaneously with his June 30, 1992 telephone conversation with Dysert.

Further, Saporito's memorandum did not appear until the day before the hearing, despite appropriate prior discovery. Counsel for the complainant acknowledged that Saporito's memorandum was not listed on his exhibit list, and that he had seen it only one hour previously over lunch. He stated that Saporito told him that, although he had previously searched his files, he was unable to locate the document until the night before the February 18, 1993 hearing. (T. 184, 187). The late appearance of Saporito's memorandum, in addition to its internal inconsistences, suggest that it may have been fabricated entirely.

Saporito's testimony was also not supported by NRC senior allegations coordinator Oscar DeMiranda. On May 10, 1993, DeMiranda testified by deposition that in a meeting, Thomas Saporito told him that "Mr. Dysert had relayed safety allegations to Mr. Saporito" about CR-3. (CX-27, pp. 5-6). The subject of those "safety allegations" was not explained. The strangely artful wording of both the questions put to and the answers given by DeMiranda in the deposition places in doubt whether Saporito

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discussed the JCC relays with him at all, or talked only about the many allegations of Dysert's DOL complaint that did not survive to the hearing. DeMiranda had no documents, memoranda, notes, or files relating to the contact or conversations between Dysert and Saporito. (CX-27, pp. 5-6, 8-9).

B. Discussion

1. *Is complainant a covered employee under the ERA?*

Section 5851(a) of the ERA provides in pertinent part that "[n]o employer ... may discharge any employee or otherwise discriminate against any employee ... ." Complainant has sued FPC, not ESG, the employment agency contractor which arranged for him to work at CR-3. FPC expressly disclaims an employment relationship with complainant. (RX-25 p. 153). I must therefore consider the threshold issue of whether Dysert is an employee under the Act.

In *Hill v. TVA*, 87-ERA-23 and 24 (Sec. Dec. May 24, 1989), the complainants, like Dysert, were employees of a company which had a contract with TVA. The contract was to develop and implement a program to identify, investigate and report the quality and safety concerns of TVA employees. Complainants alleged that TVA violated the ERA by significantly restricting and then refusing to renegotiate the contract with their employer, causing their termination, in retaliation for their investigation, corroboration and disclosure of safety problems in TVA's nuclear power program. The Administrative Law Judge recommended that the complaints be dismissed because the complainants were not employees of TVA.

Secretary Dole reversed, holding that, in order to effectuate the broad remedial purposes of the Act, she interpreted the term "any employee" to mean that, because the complainants were "employees" of the company which had contracted with TVA, even though they were not employees of TVA itself, they were protected under the Act. In other words, the ERA forbids a covered employer to discriminate against *any* employee, even one other than its own. Dysert's employment relationship with ESG, which contracts with FPC, therefore brings him within the protection of the Act.

The Secretary also noted in *Hill* that, if the complainants had been found to be constructive employees of the

respondent under the so-called "right to control" test, there would be no question of their right to complain. The "right to control" test has been summarized by the United States Supreme Court as fol

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lows:

> In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

Community for Creative Non-Violence v. Reid, 490 U. S. 730, 751-752 (1989).

The product accomplished by Dysert was highly skilled professional engineering work. The location of his work was on FPC premises at CR-3 using the company's instrumentalities and tools in their regular business of procuring equipment and supplies for the continued operation of their nuclear power plant. Dysert's relationship with FPC was expected to be ongoing, according to his contract with ESG. In accomplishing the product, he was directly supervised by, and received all assignments from two FPC employees, Jim Colby and John Sipos, so the hiring party clearly had the right to assign additional projects to him. His discretion over when and how long to work was limited to his right to terminate the employment relationship on 30 days notice to ESG; his hours were otherwise fixed by FPC management. He was paid by the hour, not by the job. He was not in business for himself. These factors demonstrate that FPC had the right to control the manner and means by which Dysert accomplished the product. Therefore, I find that, notwithstanding FPC's disclaimer, complainant had an employment relationship with FPC as well as ESG.

I conclude that complainant Dysert is a covered employee under the ERA.

2. Did the 1992 ERA amendments, by lengthening the limitations period for filing whistleblower complaints, apply

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retroactively to render timely complainant's otherwise *untime-*

ly complaint?

At the time Dysert was notified of his termination, an ERA complainant had 30 days from the date of an adverse employment action to file a complaint with the Secretary of Labor. *See* former 42 U.S.C. §5851(b)(1)(1983). The Energy Policy Act of 1992, Pub. L. No. 102-486, amended the whistleblower provisions of the ERA, *inter alia*, to extend the limitations period for filing a whistleblower complaint to 180 days. Dysert filed his complaint on December 11, 1992, after the October 24, 1992 effective date of the amendments, within 180 days but after 30 days from the date he was notified of his termination on June 19, 1992.

Dysert argues that his complaint is timely. FPC argues that claimant had to file his complaint with the Secretary within the 30-day time limit then in effect, and, because he failed to do so, his claim expired and could not be revived. It is undisputed that Dysert missed the 30-day deadline under the ERA before it was amended; the timeliness of his complaint and my jurisdiction therefore depend on whether the 1992 amendments extending the limitations period from 30 to 180 days apply to his claim. This appears to be a case of first impression before the Secretary with respect to the retroactivity of the lengthened limitations period of the 1992 ERA amendments.

The United States Supreme Court has recently considered the issue of statutory retroactivity in the case of *Landgraf v. USI Film Products*, 62 U.S.L.W. 4255, No. 92-757 (April 26, 1994), involving the 1991 amendments to Title VII of the Civil Rights Act of 1964. In *Landgraf*, the Court reviewed the basic principles for determining which law applies when a new federal statute has been enacted after the events leading to a lawsuit -- the law in effect when the events occurred or the law in effect when a court decides the matter.

Under *Landgraf*, a court must initially determine whether the express language of the statute demonstrates Congressional intent to give retroactive effect to the amendments. If so, there is no need to resort to canons of judicial interpretation. *Id.* at 4263, 4265. Even without specific legislative authorization, however, application of new statutes to prior conduct is proper if the intervening statute authorizes or affects the propriety of prospective relief, applies a new jurisdictional or procedural rule such as a right to jury trial, or is otherwise collateral to the main cause of action. *Id.* at 4264-4266. If, however, a new statute (1) impairs rights a party possessed when

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he acted, (2) increases a party's liability for past conduct, or (3) imposes new duties with respect to transactions already completed, the presumption against statutory retroactivity is invoked, and the new statute cannot apply to prior conduct "absent clear congressional intent favoring such a result." *Id.* at 4266.

The 1991 Title VII amendments created, for

certain violations, a new right to compensatory and punitive damages, and to a jury trial when such damages were sought. The Court held that their application would therefore impermissibly increase a party's liability for past conduct, because prior Title VII law afforded no relief at all for some types of conduct, and only backpay for others. Further, the retroactive imposition of punitive damages would raise a serious constitutional question of a forbidden *ex post facto* enactment. *Id.* at 4266. The 1991 amendments therefore required a clear expression of Congressional intent to apply to prior conduct.

The Court could not find such an expression in the language of the 1991 amendments. The relevant language stated only that, "(e)xcept as otherwise specifically provided, this Act and the amendments made by this Act shall take effect upon enactment." In contrast, the 1990 version of the Act, vetoed by the President in part because of its retroactivity provisions, had stated that the amendments "shall apply to all proceedings pending on or commenced after the date of enactment of this Act." *Id.* at 4258-4261. Similarly, the 1972 Title VII amendments applied "with respect to charges pending with the Commission on the date of enactment of this Act and all charges filed thereafter." (Slip op. at 12, n. 10).

The 1972 amendments to Title VII, like the ERA amendments at issue here, extended the limitations period for filing an administrative complaint, from 90 to 180 days. The Supreme Court held in *International U. of Elec. Wkrs. v. Robbins & Myers*, 422 U.S. 229 (1976) that the longer limitations period was applicable to an EEOC complaint which, as here, was untimely when filed but timely under the new amendments. Relying on its earlier decision in *Chase Securities Corp. v. Donaldson*, 325 U.S. 304 (1945), the Court rejected the argument (also made by the employer here) that Congress was without constitutional power to revive an action which, when filed, is barred by the running of a limitations period. "Statutes of limitations go to matters of remedy, not to destruction of fundamental rights. ... [C]ertainly it cannot be said that lifting the bar of a statute of limitation so as to restore a remedy lost through mere lapse of time is *per se* an

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offense against the Fourteenth Amendment." *Chase*, 325 U.S. at 314-316.

The 1992 ERA amendments state that they "shall apply to claims filed ... on or after the date of the enactment of this Act." Energy Policy Act §2902(i). As counsel for the complainant points out, there is very similar language in the 1984 amendments to the Longshore and Harbor Workers' Compensation Act (LHCA). It provides that the LHCA amendments "shall apply ... with respect to claims filed after such date ... ." *Id.* at 1563. This language has been interpreted by the United States Court of Appeals for the Eleventh Circuit to apply LHCA to previously time-barred claims. *Alabama Dry Dock and Shipbuilding Corp. v. Sowell*, 933 F.2d 1561-65, *reh. den.* 945

F.2d 415 (11th Cir. 1991).

In reaching its decision in *Sowell*, the Eleventh Circuit reasoned that, if Congress had intended to apply the new amendments only to claims *arising* after the effective date, language applying the amendments to claims *filed* after a statute's enactment would not be necessary. The court also observed, quoting *Chase, supra,* that "statutes of limitation go to matters of remedy, not to destruction of fundamental rights." *Sowell* at 1565. *See also Davis v. Valley Distributing Co.*, 522 F.2d 827, 831 (9th Cir. 1975) *cert. denied* 429 U.S. 1090 (1977)(words of the 1972 amendment affirmatively suggested an intention to encompass discriminatory conduct that occurred before the Act was passed, because "'charges pending ... on the date of enactment of this Act' could only involve conduct occurring prior to that date," and, since the amendment applied to "all charges filed thereafter," and the employee's claim was not formally filed until after the amendment was enacted, "it fell within the literal words of the statute").

The *Sowell* court concluded that "[t]he only sensible reading of the provision, then, is that Congress was addressing claims that arose *before* the effective date of the statute but were filed *after* the effective date." *Id.* at 1564. I find that this is also the only sensible reading of the language of Energy Policy Act Section 2902(i) -- that Congress intended the amendments to apply to claims that arose before, but were filed on or after, the effective date of the statute.

The ERA's prohibition against whistleblower retaliation dates from 1974. The 1992 Energy Policy Act amendments merely extend the time for complaining about such retaliation. Application of the extended ERA limitations period to this case in no way impairs rights FPC had at the time it terminated complainant,

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increases its liability for past conduct, or imposes new duties with respect to completed transactions. The longer limitations period is therefore the type of collateral procedural rule that, even absent express legislative authorization, may properly be applied to pre-amendment conduct. (See *Landgraf*, *Id.* at 4264, 4266 (jury trial right "is plainly a procedural change of the sort that would ordinarily govern in trials conducted after its effective date.")) I therefore find that Dysert's complaint to the Department of Labor was timely because it was filed within 180 days of his notice of termination by FPC.

3. Has complainant established a violation of the employee *protection provisions of the ERA?*

In analyzing this case, I apply the rules for allocating the burdens of proof set forth in the 1992 amendments to ERA. These rules are procedural, and make only minor changes to prior case law on the issue. Their application here therefore poses no retroactivity problems under *Landgraf*. I note that

counsel for both parties have also applied these rules in briefing the case.

To prevail under the ERA, Dysert must first demonstrate that the respondent's protected activity "was a contributing factor in the unfavorable personnel action alleged in the complaint." ERA Sec. 211(b)(3)(C). Even if such a demonstration is made, no relief is available "if the employer demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of such behavior." ERA Sec. 211(b)(3)(D). As discussed below, I find that complainant Dysert engaged in a protected activity and was subject to an unfavorable personnel action, but there was no causal relationship between the two events. Accordingly, complainant has failed to meet his burden to prove an ERA violation.

a. Protected activity.

Under the pre-1992 ERA, an employee was protected against discrimination if the employee:

(1) Commenced, caused to be commenced, or was about to commence or cause to be commenced a proceeding under the ERA or the Atomic Energy Act of 1954 (AEA);

(2) Testified or was about to testify in any such proceeding; or

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(3) Assisted or participated or was about to assist or participate in any manner in such a proceeding ... *or in any other action to carry out the purposes of [the ERA or the AEA]*. (emphasis added).

ERA Section 210(a)(1) - (3). (now designated as Section 211(a)(1)(D) - (F)).

The 1992 amendments added three additional categories of protected activity. An employee is now also protected against discrimination if the employee:

(4) Notified his employer of an alleged violation of [the ERA or the AEA];

(5) Refused to engage in any practice made unlawful by [the ERA or the AEA], if the employee has identified the alleged illegality to the employer; or

(6) Testified before Congress or at any Federal or State proceeding regarding any provision (or proposed provision) of [the ERA or the AEA].

ERA Section 211(a)(1)(A) - (C).

Despite the broad scope of the complaint Dysert originally filed with DOL, he concedes now that the only allegedly protected activity at issue here relates to his work in connection with the JCC relays. (T. 12, 13, 158, 175). As counsel for Dysert stated in opening argument:

> It is our contention that the protected activity in this case and really the only protected activity we are going to focus on was his right to place a reject notation on the supplier deviation request form. (T. 12).

Complainant asserts that his "involvement in a QA function and raising of safety concerns about the reliability of safety related parts at a nuclear power plant were exactly the kind of activities Congress sought to protect when it enacted the nuclear whistleblower protection act." (C. post-hearing proposed findings of fact and conclusions of law at 35).

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Dysert presented no evidence at the hearing that, at the time of his termination, he was about to commence or had commenced a proceeding under ERA or AEA, or was about to testify or had testified in such a proceeding or before Congress or at any federal or state proceeding with respect to the JCC relays. (1), (2), and (6) therefore do not apply.

Dysert did not include in his proposed written rejection of the SDR any allegation that the condition of the three JCC relays constituted a violation of the ERA or the AEA or that acceptance of them would constitute such a violation. He did not present such an allegation verbally to either Sipos or Colby. He conceded that there was nothing illegal about the respondent's final disposition of the SDR with respect to the three JCC relays nor did it violate NRC regulations. His proposed initial rejection therefore does not constitute a notification to his employer within the meaning of (4). There was also no work refusal within the meaning of (5), because Dysert failed to identify any alleged illegality and, of course, he ultimately signed off on the SDR as amended. Accordingly, only the "any other action" provision of (3) is conceivably applicable.

Although he failed to file a formal complaint with FPC management or the NRC at the time he signed off on the final disposition of the JCC relays, Dysert gave credible testimony that he believed the relays might be unsafe because of the numerous changes to them indicated by the supplier's printout. His attempts to reject the JCC relays for shipment on the SDR forms represented a communication to the employer. Accordingly, I find that his initial proposed rejections of the JCC relays constituted other action to carry out the purposes of the ERA or AEA, and were therefore protected activity. *See*

e.g. Larry v. Detroit Edison Co., Case No. 86-ERA-2, Sec. Dec. September 28, 1993(slip op. at 6) (a communication to a manager about an unsafe condition is protected activity); *Shusterman v. Ebasco Services, Inc.*, Case No. 87-ERA-27, Sec. Dec. January 6, 1992 (slip op. at 8)(*aff'd mem. Shusterman v. Secretary of Labor*, No. 92-4029 (2d Cir. Sept. 24, 1992))(disqualification of prospective vendors is protected activity); *Bassett v. Niagara Mohawk Power Corp.*, Case No. 85-ERA-34, Sec. Dec. September 28, 1993 (slip op. at 5) (filing of internal quality control reports is protected activity).

b. Unfavorable Personnel Action

Complainant asserts that respondent's failure to retain him as a permanent employee at CR-3 is an actionable unfavorable

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personnel action. I find, however, that he did not have a reasonable expectation of permanent employment.

Dysert was not a CR-3 staff employee like engineers John Sipos and Jim Colby, but rather, one of a large group of temporary contract employees. Dysert (like Varner), was brought in as "staff augmentation." The only express terms of Dysert's employment at FPC are found in his contract with ESG. Under this contract, he could be let go immediately for cause, or on 30 days notice without cause. The year term of his contract was not a guarantee, because the contract terms make clear that his employment could be terminated long before a year had expired, as long as he received 30 days written notice from ESG. These short termination provisions are evidently intended to accommodate the fact that, as Jim Colby credibly testified, CR-3 often releases contract employees early. In its contract with ESG, FPC specifically reserved the right to early release of its contract employees.

Nothing in Dysert's contract gave him any rights to counseling, suspension or reprimand prior to termination, either by ESG or FPC. Nor was there any evidence of record that even permanent FPC employees could expect such treatment prior to termination. I therefore cannot agree with complainant's argument that, because his performance was admittedly satisfactory, the lack of such pre-termination procedures had some significance. Nor is it of any consequence that complainant was given only oral notice of his termination by FPC; there was no evidence that he was entitled to written notice except by ESG. The record contains no evidence to suggest that ESG did not comply with that term of his employment. Dysert's contract with ESG was obviously a risky one. Dysert is an extremely well-educated and highly paid professional, and must have understood the risks involved.

Because Varner, who in effect took over Dysert's contract, worked for another six months until the end of the contract period before his termination, I find that Dysert could have reasonably expected his employment under this contract to last for one year. I therefore conclude that Dysert's termination six

months before the end of his one-year contract constituted an unfavorable personnel action within the meaning of the Act. *Cf. Nichols v. Bechtel Construction, Inc.*, 87-ERA-44, Sec. Dec. November 18, 1993, slip op. at 8-9 (back pay, but not reinstatement, of laid off nuclear power plant employee held appropriate after transfer from permanent position to outage crew, where he would have been laid off anyway when crew disbanded for lack of work).

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c. Causal relationship between the protected activity and the unfavorable employment action.

Dysert claims that Sipos and Colby pressured him to change the final disposition of the JCC SDR from rejection to acceptance of the relays and terminated him because of their displeasure at his opposition to the change. Sipos and Colby deny pressuring complainant to change the disposition of the SDR and they deny that his work on the JCC SDR had anything to do with his termination. The evidence of record supports their position, not complainant's.

There was no evidence that professional disagreements on the best way to insure the safety of equipment procured for the plant were cause for retaliation at CR-3. On the contrary, it appears that the company encouraged discussion, by, for example, requiring verification by another engineer on every project, which is appropriate given the importance of the safety issues at stake. The picture presented is not one of supervisors punishing an employee for whistleblowing, but rather of professionals conscientiously seeking to resolve legitimate differences of opinion.

Further, I can find no motive for Sipos and Colby to punish complainant for suggesting rejection of a single SDR for items which were not even for current use. They had a large volume of purchase requisitions and SDRs to process every month. There was unrebutted evidence that reviewer changes of proposed SDR resolutions were not uncommon. Complainant had not previously been reversed on any of his proposed dispositions of SDRs. Both Sipos and Colby themselves, during the process of evaluating the JCC SDR, had considered rejecting it: on May 28, 1992, Colby changed complainant's May 22, 1992 proposed disposition from acceptance to rejection because JCC offered a certification only back to 1982, rather than to 1971 as required; and Sipos initially approved complainant's May 29, 1992 proposed rejection of the SDR in favor of third party testing. I also find it unlikely that, if Colby had really been intent on retaliating against complainant, he would have given him a letter of recommendation and a list of other CR-3 supervisors who might have openings for him.

The evidence supports Sipos' testimony that the change in the final SDR disposition came about not because of pressure by himself and Colby, but because of complainant's work with Ron Smith, the senior nuclear quality assurance specialist and QA's

representative on the JCC relays matter. Ron Smith was closely

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involved from the beginning with the JCC relays purchase. He arranged for the original source inspection of JCC with EBASCO, made the initial contact with NPES to advise of possible problems with changes to the relays, received the SDR from JCC's quality control manager Richard Schneider, and subsequently negotiated with Schneider and EBASCO source inspector Allison about resolution of the problems and the delays in accepting the relays for shipment. It was Smith's May 29, 1992 fax to JCC that countermanded complainant's original resolution to reject the relays and ship them to F&H for testing, a resolution that Sipos had originally approved.

It is much more plausible that, as Colby testified, Smith convinced complainant that acceptance of delivery of the few relays involved in the purchase order on "quality control hold" in inventory was a more cost effective, but still safe, way to deal with a long time supplier with whom CR-3 needed to continue an ongoing relationship. There is no evidence that Ron Smith had any involvement with complainant's termination. Nor would he have had any motivation for retaliation in view of complainant's agreement with his wishes on the SDR disposition.

As a long time worker in nuclear plants, Dysert must have understood that outages and related expansions and contractions of staff were a common event. As his counsel explained in opening argument, "an outage situation is when a plant voluntarily shuts down for cleaning [and] maintenance. It is done on regular intervals, and atomic facilities generally need to bring in a large amount of employees to work on an outage. When the outage is over, those employees are gone." (T. 11). *See also e.g. Tritt v. Fluor Constructors, Inc.*, 88-ERA-29, slip. op. at 2 & n.3 (Sec. Dec. August 25, 1993; *Pillow v. Bechtel Construction, Inc.*, 87-ERA-35, slip op. at 2 & n.1 (Sec. Dec. July 19, 1993)(outages at nuclear plants are a time during which workers make repairs and modifications, and employment increases). Dysert was terminated because of a general layoff in connection with the completion of the Spring 1992 outage at CR-3, and because Colby reasonably relied on Sipos' opinion that, given the choice of retaining one of two contract employees in the layoff, Varner was the better choice. I find that no retaliation was involved in complainant's termination.

Finally, because of Dysert's sophistication and expertise as a whistleblower, I do not find credible his claim that, although he believed he had been discriminated against at the time of his discharge in violation of his ERA rights, he waited almost six months to file his complaint because he feared retaliation. (T. 131-2, 172-3). At the time, the ERA required the filing of a complaint with DOL within 30 days of the adverse employment action. Complainant concedes that "he knew of his remedy under the old Section 210 of the ERA" and "that he was aware of those remedies and rights as of the time that his employment ceased in July of 1992." (T. 132). He was then being represented by attorney Mark Surick in a pending whistle-blower complaint against a

former employer, Florida Power and Light Company (a company unrelated to respondent). He had already brought a timely whistleblower action before the Secretary of Labor against another former employer, Westinghouse. (*See Dysert v. Westinghouse Electric Corp.*, Case No. 86-ERA-39, Sec. Dec. October 30, 1991). It seems more likely, as counsel for the employer argues, that Dysert did not file a timely complaint under the old ERA because he himself did not believe he had a viable complaint, i.e. that his termination represented retaliation for a protected activity.

In sum, I find no causal relationship between complainant Dysert's termination by respondent FPC and his proposed rejections of the JCC SDR.

RECOMMENDED ORDER

IT IS HEREBY RECOMMENDED that the case be DISMISSED.

_____
EDITH BARNETT
Administrative Law Judge

DATED:
Washington, D.C.
EB:bdw

[ENDNOTES]

[1] The following abbreviations are used for citations to the record: C-Complainant; R-Respondent; ALJ-Administrative Law Judge; X-Exhibit; T.-Transcript.

[2] I have designated as page 8A the unnumbered page between pages 8 and 9 of RX 14. This page is a cover sheet signed by Sharon Broaddus at ESG submitting Dysert's resume to Don Porter and Jim Colby at FPC.

[3] The function that an item performs determines whether FPC classifies it as safety related or non-safety related. A safety-related function is any function that meets three criteria: (1) It is a pressure boundary to radioactivity; (2) it requires the mitigation of an accident; and (3) it mitigates the release of radioactivity within the plant or outside the plant to the general public. (T. 212, 214-15, 235).